Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

CITY OF YONKERS,

Petitioner,

v.

UNITED STATES AND YONKERS BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court-ordered housing remedy designed to further racial balancing of neighborhoods by requiring moves by families to opposite race-neighborhoods is a permissible remedy.

2. Whether a court-ordered housing discrimination remedy that requires a public entity to effectively exclude nonminority families from a subsidized housing program and to prefer minority families that are not identified victims of discrimination is narrowly tailored under strict scrutiny requirements.

3. Whether an appeals court may defer to the district court's equitable discretion in assessing the need for race-based relief under the narrow tailoring obligations of strict scrutiny.

PARTIES TO THE PROCEEDINGS

I. Active in this aspect of the litigation:

United States

Yonkers Branch, National Association for the Advancement of Colored People

City of Yonkers

II. Not active in this aspect of the litigation:

Yonkers Board of Education

Yonkers Community Development Agency

State of New York, its Governor, and various other state officials

U.S. Department of Housing and Urban Development

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Petitioner City of Yonkers, a New York municipal corporation, respectfully prays that the Supreme Court of the United States grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit (Judges Kearse, Calabresi and Sotomayor) entered on January 5, 2001 in appeal number 00-6022. Pet. App. 1a. That order upheld an unreported order entered by U.S. District Judge Leonard B. Sand (S.D.N.Y.) entitled Third Supplemental Long Term Plan Order ("TSLTPO"), dated December 29, 1999. Pet. App. 23a. The TSLTPO follows a series of remedial orders in the longstanding *United States v. Yonkers* housing desegregation litigation. The City of Yonkers contends the TSLTPO's race-conscious modification of those prior remedial orders fails to meet the requirements of constitutional strict scrutiny.

OPINIONS BELOW

The decision of the Second Circuit is reported as *United States v. Secretary of Housing and Urban Development*, 239 F.3d 211 (2d Cir. 2001) and is reprinted at Pet. App. 1a-22a. The district court's Third Supplemental Long Term Plan Order is not reported, but is reprinted in the Appendix to this petition at Pet. App. 23a-31a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Second Circuit issued its decision affirming the district court's order on January 5, 2001. No petition for rehearing was filed. This Court has jurisdiction to consider this petition pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

CONSTITUTIONAL PROVISIONS

The City of Yonkers challenges the district court's order as violating the equal protection requirements of the Fifth and Fourteenth Amendments to the United States Constitution. *See* Pet. App. 422a.

STATEMENT OF THE CASE

In 1986, the district court entered its Housing Remedy Order outlining the responsibilities of the City of Yonkers, New York to remedy its violation of federal law in confining public and subsidized housing to the southwest portion of Yonkers. After many years of disputes and no progress by court-controlled agents toward a remedy, in 1996 the United States District Court for the Southern District of New York entered an order on consent that embodied the final plan for the subsidized housing remedy. Through the 1996 order, the City of Yonkers accepted responsibility to facilitate hundreds of units of affordable housing through the use of existing housing and new construction for qualified families on a race-neutral basis. Two years into the program, Yonkers had completed some 170 units of integrative, subsidized existing housing transactions. Some 70% of the families that obtained housing through the program were black or Hispanic.

But, the plaintiffs and the district court were dissatisfied because some of the housing beneficiaries were white. The district court, *sua sponte*, modified the 1996 order to require the City to use race in facilitating housing opportunities for qualified families. The Second Circuit Court of Appeals upheld the racial remedy finding it was narrowly tailored to further a compelling governmental purpose. Yonkers seeks review by this Court, claiming the modification fails to meet the strict scrutiny standards of constitutional equal protection. A court order that requires a defendant to subsidize moves by minority families to opposite-race neighborhoods is not a permissible remedy for past discrimination; rather, it is a program of outright racial balancing.

A. Course of Proceedings In The District Court.

In 1980, the United States and the Yonkers Branch of the NAACP filed complaints alleging that the City of Yonkers had unconstitutionally segregated subsidized housing as well

as the public schools of the City of Yonkers.[1] In 1985, the district court concluded that public and subsidized housing in the City of Yonkers was intentionally segregated by race. *United States v. Yonkers Board of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985). The 1985 liability decision found that the City had segregated housing patterns by concentrating all public and subsidized housing in southwest Yonkers and by refusing to approve subsidized housing outside that area due to the expected race of the occupants. On May 28, 1986, the district court entered the Housing Remedy Order ("HRO"), 635 F. Supp. 1577 (S.D.N.Y. 1986); Pet. App. 96a. Section VI of the HRO required the City to develop a plan for the creation of additional subsidized housing in east and northwest Yonkers.[2] Pet. App. 110a-112a. The Second Circuit Court of Appeals for the Second Circuit affirmed the liability

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1. School segregation claims were also made against the Yonkers Board of Education. The school desegregation portion of this litigation is not implicated by the matters raised in this petition.

2. In 1986 the district court conducted a six-day evidentiary hearing on the nature and scope of the housing remedy. The proposed remedies as well as the experts were clear that race should not be a criteria for occupancy of the remedial housing. Rather, the United States and NAACP sought a remedial order designed to create housing for low and moderate income families in currently white neighborhoods of east Yonkers. Pet. App. 58a-95a. The expert witness tendered by the United States proposed that the remedy be designed to provide affordable housing in parts of Yonkers that are not currently areas of minority concentration. Pet. App. 34a-37a. He explained that there was a substantially higher representation of black families among lower income groups in Yonkers, Pet. App. 39a-42a, therefore, he advocated a remedy that was designed to attract families based on their economic status. Pet. App. 42a-44a. The expert for the United States advocated "affirmative marketing" as a tool to encourage minority families to apply for affordable housing and agreed that some housing would be provided to white families. Pet. App. 45a-54a. The government's expert was clear that race should not be a criteria for occupancy of the remedial housing. Pet. App. 53a-55a.

findings and entry of the HRO. *United States v. Yonkers Board of Ed.*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

On January 28, 1988, the district court entered a consent decree that established a long term goal of 800 units of subsidized housing to comply with section VI of the HRO. Pet. App. 119a. On June 13, 1988 the district court entered the Long Term Plan Order ("LTPO"). Pet. App. 133a.[3] The LTPO required the City to adopt an Affordable Housing Ordinance ("AHO") and set forth a private-developer driven plan to construct affordable housing in those areas from which subsidized housing had been unlawfully excluded. With the expectation of encouraging private developers to construct new units of affordable housing, rather than through municipally-sponsored projects, the LTPO and AHO used a combination of mandated incentives (such as zoning relief and tax abatements) and a requirement that at least 20% of all newly constructed multi-family units in Yonkers be made available as affordable housing. The LTPO also created the Fair Housing Implementation Office ("FHIO"), an independent agency responsible to the district court, which was charged with responsibility to implement the remedy. Pet. App. 148a-149a.

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3. These orders were explained in greater detail in this Court's decision in *Spallone v. United States*, 493 U.S. 265, 268-71 (1990) (addressing the City Council's 1988 contempt of district court's orders). As the Court of Appeals noted, in 1988 the City of Yonkers went through a difficult period of municipal opposition to compliance with the housing orders that culminated in a well-publicized contempt order. That order had the potential to bankrupt the City and, following this Court's denial of a stay, the City complied with the order. *See Spallone*, 493 U.S. at 273, 277. No elected official from the 1988 era holds a City office today. At no time since 1988 has the district court found the City or any of its officials in contempt of its orders. Any notion that the opposition of 1988 has continued into recent years simply has no basis in truth.

Nothing in the LTPO required or permitted the occupancy of remedial housing on the basis of race. The LTPO provided that occupancy priority for remedial housing should be provided to:

> 1) persons who, between January 1, 1971 and the date assisted housing pursuant to this Decree is made available, have been residents of public or subsidized housing in the City of Yonkers. Such persons shall be given the first opportunity to apply for such housing, which opportunity shall be afforded up until thirty (30) days following the date the final assisted housing units pursuant to this Decree are made available. Occupancy choice from among such persons applying shall be on a first-come, first-served basis;
>
> 2) residents of the City of Yonkers; and
>
> 3) persons employed in the City of Yonkers.

Pet. App. 140a. These priority groups have come to be known in this litigation as Priority 1, Priority 2, and Priority 3, respectively.

Conditions in the housing market changed, and with the general downturn in real estate, private developers proved reluctant to enter the assisted housing market. By late 1990 it became clear to the parties and the district court that modifications to the LTPO were needed if any results were to be obtained. In 1992 the City developed a proposal for modifying the LTPO that required the City to provide some 709 affordable housing units over a four-year period. On April 14, 1992, the City, United States and NAACP reached an agreement that the City plan was the basis for an acceptable modification of the LTPO. Based on that agreement, the Yonkers City Council adopted the resolution approving the City plan. The resolution marked the end of

an era of City opposition to the housing orders and an indication of political will to resolve the housing dispute in Yonkers. On June 9, 1992, the City moved the district court to enter its proposed modified Long Term Plan Order.

Following a lengthy evidentiary hearing, the district court entered the Supplemental Long Term Plan Order Adopting Additional Remedial Measures on October 5, 1993. Pet. App. 154a. The order rejected the City's plan, set forth a framework for the construction of new housing on three sites as recommended by the court-controlled FHIO, established a schedule for the utilization of 250 existing housing units, and placed responsibility for implementing the remedy orders with FHIO and a Housing Special Master. *See id.* The Court of Appeals upheld entry of the 1993 order, including the delegation of implementation authority to the Special Master, as within the district court's equitable discretion. *United States v. Yonkers Board of Education*, 29 F.3d 40 (2d Cir. 1994), *cert. denied*, 515 U.S. 1157 (1995).

Pursuant to the 1988 and 1993 orders, the City had little control over the implementation of the housing orders. Under the court-created FHIO, and later under the control of the Housing Special Master, the years 1988 through 1995 did not yield significant progress in the production of new housing. In February 1996, the district court met with newly-elected Yonkers Mayor John Spencer to discuss the prospect of breaking the logjam in completing the housing remedy. The Mayor sought a return of control over the remedy to the City. Following that meeting, the litigation parties embarked on a lengthy negotiation that culminated in the entry by consent of the Second Supplemental Long Term Plan Order ("SSLTPO") on November 6, 1996. Pet. App. 170a-173a; 177a. The SSLTPO provided a number of revisions to the remedy orders designed to complete the City's obligation to provide a remedy for housing discrimination. First, the order required the City to facilitate construction of mixed-income

housing on the three sites designated by the district court in the 1993 SLTPO and at a fourth site to be named by the City. Pet. App. 178a-180a. Second, the order required the City to facilitate 100 units of affordable housing per year for six years through "existing housing and/or new construction." Pet. App. 179a. Third, the order dissolved the court-controlled Fair Housing Implementation Office, reduced the Housing Special Master's role to that of a monitor, and required the City to create its own Yonkers Affordable Housing Department within City government as the agency responsible for implementation of the housing remedy. Pet. App. 182a-183a. Finally, the order provided that upon attainment of the obligations set forth in the order, the City will have completed all of its obligations under the various housing remedy orders. Pet. App. 179a, 186a.

During the period following entry of the SSLTPO, the City aggressively began implementation of the housing remedy through its new Affordable Housing Department. The City's housing office took applications and qualified families for assistance under the income and priority guidelines of the orders, assisted families in locating suitable housing for purchase in east and northwest Yonkers, and then provided a down payment/mortgage assistance subsidy of up to $40,000 to assist the family in purchasing a home. The litigation counsel met approximately once a month with the court's monitor and the City's Affordable Housing Department employees, reviewed the City's progress and sought to resolve differences over implementation issues.

The City began an outreach program that aggressively solicited applicants in need of affordable housing. In order to ensure that families in Priority 1 (former or current residents of Yonkers public or subsidized housing) were reached, in late 1998 the City conducted a special outreach to some 1500 Priority 1 households. Lodging App. 2, pp. 1-2. The outreach garnered 183 new applications from Priority 1 families. A-1177-85.

The City administered the program on a race-neutral basis. In the first two years of the program, the City assisted over 170 families in purchasing or renting affordable housing. Over 70% of those families were African-American or Hispanic. Lodging App. 2, Section III.

Following the first year of implementation, the parties agreed that the City would receive 81.5 credits against the annual 100 unit per year goal of ¶ 2 of the SSLTPO. A-1828. At the end of the second year of implementation, the City tendered a report seeking 89.5 credits toward its annual goal. Lodging App. 2, Section III, p. 7. The district court held a hearing on February 24, 1999 to address the plaintiffs' objections to the City's second year compliance report. Pet. App. 189a. The NAACP objected to the provision of housing opportunities for nonminority families that had otherwise met the requirements of the program. Pet. App. 195a-196a. Objecting to the City's claim that the program was intended to use race-neutral means by the creation of affordable housing outside southwest Yonkers to achieve desegregation, the NAACP claimed "the purpose was to foster integration through providing for minority households to make desegregative moves." Pet. App. 196a. On that basis, the NAACP, with veiled support from the United States, objected to providing credit against the City's annual goal for transactions involving nonminority applicants that purchased affordable housing in the target neighborhoods. The NAACP also claimed the City was not serving enough Priority 1 families. The City asserted that it was serving all interested Priority 1 families as well as Priority 2 or 3 families on a race-neutral basis. Pet. App. 214a-234a. The City contended that the priorities of the LTPO were stated in race-neutral terms and that the City was fostering desegregation through its race-neutral, economically-driven housing program. Pet. App. 215a-217a. The district court directed that consideration be given to the "submission to the Court of a proposed revision to the remedy

order designed to increase the ability of the priority 1 class members to have greater housing opportunity" and the parties "more carefully define what is meant by furthering the integrative purposes of the order." Pet. App. 217a-218a, 223a.

On June 1, 1999, on the recommendation of its monitor, the district court entered an order that partially approved the City's Year 2 credit report and directed the City to develop plans to enhance its outreach efforts to Priority 1 applicants and provide rental opportunities. Pet. App. 234a-237a. Finally, the order limited the City to servicing only Priority 1 families and those few Priority 2 and 3 families that had already received a commitment for housing assistance from the City. Pet. App. 237a.

On June 21, 1999, the parties made written submissions concerning pending housing issues before the district court. The NAACP and United States urged the court to reject full credit for white families that received housing benefits under the City's program. Pet. App. 290a-299a. No motions for modification were filed. The City outlined the race-neutral requirements of the remedy orders and demonstrated that the contested credits were plainly within the letter and purpose of the orders. Pet. App. 251a-279a. The City demonstrated that in the first two years of its program over 70% of the beneficiaries of the program were minority families. Lodging App. 2, Section III. Finally, the City argued that the standards for modification of the earlier orders had not been met and that a race-based remedy was not justified under standards of constitutional strict scrutiny. Pet. App. 277a-279a.

The City submitted its proposed Priority 1 outreach and rental programs in compliance with the June 1, 1999 Order. Pet. App. 300a-316a. These programs were further discussed in the monitoring process, and ultimately were recommended by the monitor to the Court. Pet. App. 329a-340a. The NAACP objected to the monitor's recommendation

that these program revisions were sufficient to further the purposes of the remedy orders. Pet. App. 341a-346a.

On August 11, 1999, the monitor transmitted to the parties "Judge Sand's Tentative Conclusions" in response to the monitor's report. Pet. App. 350a-356a. The report accepted the monitor's recommendation and did not impose racial criteria for the selection of housing beneficiaries. *Id.*

Following further objection by the NAACP, Pet. App. 357a-361a; 368a-371a, the district court held a non-evidentiary hearing on September 9, 1999. Pet. App. 372a. The NAACP proposed that all credited housing transactions must involve minority families moving to non-minority areas of Yonkers. Pet. App. 384a-385a. The City opposed such race-based treatment of housing applicants, explaining that under the orders developed since 1986 the remedial housing program was expected to foster "racially integrative housing opportunities through the provision of a pool of affordable housing in the areas that were previously excluded from affordable housing opportunities." Pet. App. 390a-392a. The NAACP, in response, urged the district court to require race-consciousness in the administration of the City's program. Pet. App. 395a.

On December 29, 1999, the district court entered the Third Supplemental Long Term Plan Order ("TSLTPO"). Pet. App. 23a-31a. In relevant part, paragraph 5 of the order modified the occupancy priorities for housing beneficiaries as stated in the 1988 LTPO to provide:

> Toward that end, the Court further orders that future full credits will only be allowed and AHTF funds may only be used for the creation of affordable housing opportunities as follows:
>
> a) For Priority 1 households who move to census blocks in East and Northwest Yonkers which as of 1990 had a Black

> and Hispanic population which together totaled less than 45%;
>
> b) For minority Priority 2 and 3 households who move to census blocks in East and Northwest Yonkers which as of 1990 had a Black and Hispanic population of less than 45%;
>
> c) For non-minority Priority 2 and 3 households who move to census blocks in East and Northwest Yonkers which as of 1990 had a White population of less than 45% . . .

Pet. App. 27a-28a.[4] Based on this order, the City was required to continue serving Priority 1 families, most of whom are minority, by requiring that they buy or rent housing located in predominantly nonminority neighborhoods. The order requires that Priority 2 or 3 families must move to an opposite-race neighborhood. Minority families may choose housing almost anywhere outside southwest Yonkers, in 1,419 census blocks with predominantly nonminority populations, while nonminority families are limited to housing located in the 28 census blocks with predominantly minority populations. The City's housing program was transformed from one that provides for the creation of affordable housing in all parts of Yonkers to one that requires families to move to neighborhoods of a different race. On appeal, the City contested the race-based classification of Priority 2 and 3 families.

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4. The district court entered a further order on January 24, 2000 modifying paragraph 5 of the TSLTPO providing that its provisions apply only to existing housing transactions, but not to new construction opportunities. Pet. App. 32a-33a.

B. The Second Circuit's Decision.

The Court of Appeals upheld the race-based requirements of the district court's order. Finding that the City had defied the district court in 1988, Pet. App. at 5a, the appeals court held the City of Yonkers responsible for failures of the district court's Special Master and housing office to provide housing during the years from the late 1980's until the district court returned control of the housing remedy to Yonkers on entry of the 1996 SSLTPO. *Id.*, 6a. The appeals court acknowledged that the TSLTPO constituted a modification of the 1996 SSLTPO; but found that it met the standards for modification of *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). Pet. App. 13a-15a. The appeals court cited the district court's finding that the number of Priority 1 families assisted by the program was inadequate — although a standard of adequacy has never been set. *Id.*, 13a. Although the district court's prior orders only required the provision of affordable housing opportunities outside southwest Yonkers, the appeals court favorably recited the district court's finding that "[a]chieving the remedy's *integrative* goals depends not simply on providing subsidized housing to minority families but rather on locating minority housing outside of predominantly minority neighborhoods or locating white housing outside of predominantly white neighborhoods." *Id.*, 13a n.8 (emphasis in original). The appeals court rejected the City's undisputed assertion that over 70% of the families assisted by the program were minority (black or Hispanic) claiming that — although not a part of any prior order — the City should have *required* families to move to neighborhoods of the opposite race in order to further racial integration. *Id.*, 14a-15a. On that basis, the appeals court found that the 1996

> SSLTPO "prove[d] to be unworkable because of unforseen obstacles" — specifically the continued failure of the City to serve priority one households

> and to promote integrative housing moves — and that continued "enforcement of the [SSLTPO] without modification would be detrimental to the public interest" — the achievement of the goals of serving priority one households and desegregating Yonkers public housing.

Id., 15a (quoting from *Rufo*, 502 U.S. at 384).

The appeals court also acknowledged that the TSLTPO adopts a racial classification, but found that it met the standards of strict scrutiny analysis. *Id.*, 16a. The court summarily found the existence of a compelling governmental interest. Relying on the district court's 1985 liability decision, the Court of Appeals stated that "[t]he district court expressly found that the City has engaged in intentional racial discrimination in its subsidized housing program . . ." *Id.*, 17a.

With respect to the narrow tailoring prong of strict scrutiny analysis, the appeals panel found that the race-conscious remedy met the four-part test set forth in the plurality decision in *United States v. Paradise*, 480 U.S. 149, 171 (1987). Pet. App. 19a. Although the district court failed to make any findings to support its adoption of a racial remedy, the appeals court made its own limited findings in upholding the racial classification. First, the court found that the race-based relief was necessary because it was within the district court's equitable discretion. Pet. App. 17a-18a. Without deciding whether it was necessary to consider any less restrictive alternatives, the court found that "because of the active and passive resistence to integration displayed by the City" and the district court's statement that "the experience has not been satisfactory," the first *Paradise* factor was met. *Id.*, 18a. Second, the appeals court found the racial remedy " 'flexible' and 'ephemeral' " because the district court "will adjust the terms of the Order as needed."

Id., 18a-19a. Third, the appeals court upheld the racial classification that effectively excluded Priority 2 and 3 white families from the program as "not disproportionate to their racial mix or the size of the Yonkers housing market." It was "reasonably-paced (100 credits per year) . . ." And, the appeals court was loath to "second-guess the [District Court's] carefully considered choice of the figure[s] necessary to achieve its many purposes . . ." *Id.* at 19a. Finally, the Court of Appeals rejected the City's contention that the racial classification unfairly burdened the rights of nonminority families, because they were able to participate in the program if they moved to a predominantly minority neighborhood of east or northwest Yonkers and the order would "reduc[e] the number of new white applicants who would receive housing and not expel[ ] any white families from housing they already inhabit." *Id.* at 20a.

REASONS FOR GRANTING THE WRIT

I. Strict Scrutiny Requires A Thorough And Complete Analysis Of The Justification And Construction Of A Race Conscious Remedy To Ensure It Is Employed Only As A Last Resort.

Petitioner City of Yonkers ("City") seeks review of the decision of the United States Court of Appeals for the Second Circuit upholding a district court's order that, without findings to justify a race-based remedy, requires the City to administer its remedial affordable housing program on the basis of race. The district court's order requires the City to exclude nonminority families from participating in affordable housing opportunities in most parts of Yonkers and to prefer black and Hispanic families for the purpose of achieving a racial balance in predominantly nonminority neighborhoods. The district court's race-based remedy is not narrowly tailored to further a compelling governmental interest.

In upholding the race-based remedy, the Second Circuit summarily reviewed the four factors identified in the plurality

decision in *United States v. Paradise*, 480 U.S. 149, 171 (1987), and found that those factors were met. Pet. App. 17a-21a. In its review of those factors, however, the Court of Appeals deferred to the district court's exercise of its "sound discretion" and was loath to "second guess the [District Court's] carefully considered choice of the figure[s] necessary to achieve its many purposes . . ." *Id.*, 18a-19a. The Second Circuit's decision does not represent the level of strict and searching scrutiny required by the decisions of this Court and some of the other circuits. Review by this Court is warranted to further define how strict scrutiny should be applied in assessing whether a racial remedy sufficiently "fits" the identified compelling interest.

A. The *Paradise* Factors Alone Are Not Sufficient To Assess Whether A Racial Remedy Is Narrowly Tailored.

This Court has conclusively determined that "all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995). In reviewing racial classifications under the strict scrutiny test, most of this Court's recent decisions have focused on the first prong of strict scrutiny analysis — whether a compelling governmental interest that justifies racial-based action is present. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 279 (1986) (plurality joined in part IV). This Court has acknowledged that it has "not always provided precise guidance on how closely the means (the racial classification) must serve the end (the justification or compelling interest), . . ." *Shaw v. Hunt*, 517 U.S. 899, 915 (1995).

Many lower courts have followed the four-part test endorsed by a plurality of this Court in *United States v. Paradise*, 480 U.S. 149, 171 (1987) ("we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including

the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties").[5] While the *Paradise* factors may be helpful in evaluating some race-based relief,[6] they do not address the *extent* to which a racial remedy must be tailored to survive strict scrutiny. Justice Powell recognized this concern in *Wygant*, noting that "our decisions always have employed a more stringent standard — however articulated — to test the validity of the means chosen by a State to accomplish its race-conscious purposes." 476 U.S. at 279. *See also, id.* at n.6 (" 'particularly intense scrutiny to whether a nonracial approach or a more narrowly-tailored racial classification could promote the substantial interest about as well and at tolerable administrative expense' ").

The Second Circuit's decision recited the *Paradise* factors, but in applying them deferred to the district court's exercise of equitable discretion.[7] Rather, the Court of Appeals recognized

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5. The *Paradise* factors were first outlined in Justice Powell's concurrence in *Fullilove v. Klutznik*, 448 U.S. 448, 510-11 (1980) (Powell, J., concurring). Justice Powell assembled the original four factors from a series of Courts of Appeals decisions. *Id.* Although they have subsequently been cited by a number of the Courts of Appeals as controlling, a majority of this Court has never clearly adopted the *Paradise* factors for evaluation of whether a classification is narrowly tailored.

6. Not all Courts of Appeals have uniformly employed the *Paradise* factors. The Fourth Circuit distinguished between the *Paradise* factors and those recognized by this Court in *Croson* to assess whether a racial classification is narrowly tailored. *Podberesky v. Kirwan*, 38 F.3d 147, 158 n.10 (4th Cir. 1994). *See also Boston Superior Officers Federation v. City of Boston*, 147 F.3d 13, 23 (1st Cir. 1998) (employing a unique set of factors to assess narrow tailoring).

7. While the appeals court's level of scrutiny was superficial at best, the district court made no findings to support entry of a racial classification other than a stray comment that ". . . the experience has not been satisfactory." Pet. App. 18a.

the "sound discretion of the trial court" that generally applies when a district court fashions an equitable remedy that is not subject to heightened scrutiny. Pet. App. 18a. The lower courts failed to meaningfully apply the intense level of scrutiny necessary to ensure that the "classification at issue 'fit[s]' with greater precision than any alternative means." *Wygant*, 476 U.S. at 279, n.6. The City contends that further guidance by this Court explaining how a lower court should strictly scrutinize a racial remedy is warranted.

Contrary to the Second Circuit's finding that the assessment of the necessity for racial relief is a matter left to the "sound discretion" of the district court, Pet. App. 18a, other Courts of Appeals have adopted a much stricter standard. The Fourth Circuit has held that "[t]he essence of the 'narrow tailored' inquiry is the notion that explicitly racial preferences . . . must only be a 'last resort' option." *Hayes v. North State Law Enforcement Association*, 10 F.3d 207, 217 (4th Cir. 1993). The Eleventh Circuit wrote that "[i]f a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." *Engineering Contractors Association v. Metro Dade County*, 122 F.3d 895, 927 (11th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998). Such remedies should only be a "last resort." *Id.* at 929. *See also Alexander v. Estepp*, 95 F.3d 312 (4th Cir. 1996), *cert. denied*, 520 U.S. 1165 (1997) (follows "last resort" standard). The Fifth Circuit has required that "a race conscious remedy must be framed to address the exact effects and harms of the discrimination at issue." *Walker v. City of Mesquite, Texas*, 169 F.3d 973, 982 (5th Cir. 1999), *cert. denied*, 528 U.S. 1131 (2000). The Fifth Circuit noted the need for an "exact fit" between harm and remedy. *Id.* "Where . . . the defendants have begun making race-neutral, good faith, and effective efforts to remedy the wrongs of the part, a race-conscious remedy should only be a last resort." *Id.* at 986.

Neither the Second Circuit nor the district court engaged in an intense level of scrutiny designed to ensure that the racial

remedy was being employed only as a "last resort" and that nothing less than the effective exclusion of nonminority families from the program was necessary to cure the effects of past discrimination. Rather, the Second Circuit, employing the broader standards of school desegregation cases, Pet. App. 21a, substantially deferred to the district court's unexplained decision that a race-based remedy was necessary. Such a policy of "deference" was also followed by the First Circuit in *Mackin v. City of Boston*, 969 F.2d 1273, 1277-78 (1st Cir. 1992) ("a significant measure of deference is owed to the trial court's conclusion that a particular kind of relief is essential to heal a constitutional wound"). Such deference in assessing the first *Paradise* factor, necessity for the relief, has no support in the decisions of this Court which require strict and searching examination in assessing the legality of a racial remedy. *See Adarand Constructors v. Pena*, 515 U.S. 200, 224 (1995) ("precisely tailored"); *id.* at 236 ("detailed examination, both as to ends and as to means").

The Second Circuit's rote incantation of the *Paradise* factors does not constitute a sufficient inquiry of whether the racial classification of housing beneficiaries is necessary as a "last resort," to remedying past discrimination. This Court did not employ the *Paradise* factors in rejecting the remedy in *Croson*. *See Croson*, 488 U.S. at 507. Determination that a racial remedy exactly fits the condition to be remedied is necessary to ensure that a program of "racial balancing" is not approved under the guise of remedying past discrimination. *Id.* Here, Priority 2 and 3 minority families gain the benefits of an affordable housing program solely for the purpose of relocating more minority families to certain neighborhoods of Yonkers. Such a program is designed to further racial balancing, which should never be deemed necessary to cure the effects of past discrimination. *Croson*, 488 U.S. at 507 ("quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing").

Review by this Court is necessary to further explain how a race-conscious remedy must precisely fit the condition to be

remedied. Justice Powell's discussion of the meaning of the term "narrowly tailored" in *Wygant*, 476 U.S. 267, 279 n.6 and 7 (1986) (plurality), recognized that the term is capable of varying interpretations. But, Justice Powell recognized, "the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used." *Id.* at n.6. As discussed above, that approach has carried over into the decisions of several of the Courts of Appeals. It conveys the message that racial remedies are reserved only for the most egregious situations where nothing else will serve the desired end. The *Paradise* factors, however, lack specificity about the level of scrutiny required.[8] While the Second Circuit's decision assumed, without deciding, that a race-based order is "permissible only where no less restrict[ive] alternative is available," Pet. App. 18a, the discussion failed to fairly address how the order at issue in this case is the least restrictive alternative or, in the words of the Fourth Circuit, the "last resort." Nothing in the Second Circuit's review comes close to addressing how the remedy precisely fits the underlying purpose and is employed only as a last resort. Such a deviation from acceptable standards of strict scrutiny warrants review by this Court.

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8. In a memorandum to the general counsels of federal agencies following this Court's decision in *Adarand*, dated June 28, 1995, the Assistant Attorney General, Office of Legal Counsel evaluated the application of strict scrutiny to federal programs. He advised that "it is probably not the case that an affirmative action program has to satisfy every [*Paradise*] factor." Dellinger memorandum, at 19. With respect to the "fit", Mr. Dellinger advised that "the government may not be obliged to consider race-neutral alternatives every time that it adopts a race-conscious measure . . ." *Id.* at 21. Again, on February 29, 1996, Associate Attorney General John R. Schmidt advised federal agencies that "even under strict scrutiny, congressionally authorized affirmative action measures undertaken by federal agencies are entitled to particular deference from the courts . . ." Schmidt memorandum, at 2. Such advice to federal agencies demonstrates why further guidance from this Court to ensure that racial remedies are employed only as a last resort is absolutely critical if such remedies are to be permitted at all.

B. Federal Courts Should Make Detailed Findings To Meet the Searching Inquiry Required To Justify A Race-Based Remedy.

At no time did the district court make any findings designed to justify the employment of the race-based remedy other than making the unexplained comment that the results of the City's past implementation effort have "not been satisfactory."[9] "If a District Court order that is imposed after no evident consideration of the available alternatives can survive strict scrutiny as narrowly tailored, the requirement that a racial classification be 'narrowly tailored' for a compelling governmental purpose has lost most of its meaning." *United States v. Paradise*, 480 U.S. 149, at 201 (1987) (O'Connor, J., dissenting). Nor did the Second Circuit make sufficient findings to justify a racial remedy. While it invoked the *Paradise* factors, its recitation of them was insufficient to justify the extreme remedy imposed by the district court's order. Rather, a district court must clearly and precisely address the basis for its assessment that race-based action is necessary. *See Wygant*, 476 U.S. at 277 ("trial court must make a factual determination . . ." to support race-based action).

The Second Circuit's decision not to *require* the district court to make findings is also in conflict with decisions of the Third and Eleventh Circuits. *See Schurr v. Resorts International Hotel*, 196 F.3d 486, 496 (3d Cir. 1999) ("courts of appeals should not decide the legality of an affirmative action program in the absence of careful district court analysis of the merits"); *In re Birmingham Reverse Discrimination Employment*

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9. The City strongly disputes that assessment, given its placement of some 170 families in affordable housing that met the locational requirements of the 1996 order over a two-year period. Moreover, using race-neutral efforts, the evidence was undisputed that some 70% of the beneficiaries were minority families. Given the years of failure by court-appointed agents to produce *any* housing, the City's efforts should have been applauded by the district court rather than savaged by the plaintiffs.

Litigation, 20 F.3d 1525, 1539-40 (11th Cir. 1994), *cert. denied*, 514 U.S. 1065 (1995) (district court findings of fact are "necessary" to appellate review, otherwise "appellate court has no basis to determine whether race-based action was justified as a remedy"). The Second Circuit's decision upholding a racial remedy when the trial court failed to make any findings to justify the remedy is contrary to the decisions of this Court as well as the Third and Eleventh Circuits which require a remand to the district court for entry of appropriate findings to justify a racial remedy.

Because the district court utterly failed to justify the need for the racial classification, the Second Circuit proceeded to patch together its own findings. Pet. App. 17a-21a. But, it is clear that the findings of the Court of Appeals are infected by a deference to the district court's judgment and lack the specificity needed to ensure that the remedy "fits" the violation with sufficient precision and has been employed only as a last resort.

The need for particularized findings is well demonstrated here, where the racial remedy was imposed some fourteen years after the district court made its original liability findings. While the City does not take issue with the settled determination that many years ago the City of Yonkers engaged in unlawful discrimination by confining subsidized housing to southwest Yonkers,[10] such a finding alone cannot justify the racial classification excluding nonminority families from the City's affordable housing program. The remedy that the district court imposed in 1986 provided for the creation of subsidized housing opportunities in those parts of Yonkers from which it had previously been excluded on a race-neutral basis. And, while there is no question Yonkers took several years to accept that reality, the district court correctly approved a 1996 consent order designed to return control of the housing remedy to the defendant City for implementation on a race-neutral basis. Pet. App. 170a-175a. At no time did the lower courts sufficiently identify the

10. *See Spallone v. United States*, 493 U.S. 265 (1990).

continuing effects of past discriminatory practices that necessitated the race-based relief employed here. Nor did the district court find the remedy necessary due to obstructive conduct by the City. For example, the district court did not find that minority families were disproportional underserved by the City's affordable housing program. Indeed, the City demonstrated that some 70% of the beneficiaries families were black or Hispanic. This was clearly not a case where the City was blocking minority families from the remedial program. Without sufficient identification of the underlying facts justifying a racial classification, there is nothing to tailor the racial relief to.

"[P]roper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects." *Croson*, 488 U.S. at 510. Here, the district court made no findings to define why the 1996 consent order required modification to impose a race-based remedy. Nor are the appeals court's de novo findings sufficient, given their generalized references only to the 1985 liability order and the period of resistance that followed in the late 1980s.[11] At no time did the lower courts find resistance or obstruction by the City following the entry of the 1996 consent order.

C. The District Court Should Have Made Findings To Justify Its Conversion Of The Program To One With A Goal Of Fostering Race-Based Moves.

As discussed above, the district court failed to make any findings to justify the race-based remedy it adopted. Such

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11. At no time has it been demonstrated how the unfortunate incidents of 1988, *see Spallone*, 493 U.S. at 272, justify the imposition of a racial quota in 1999. Unlike the situation in *Paradise*, 480 U.S. at 168-72, the district court has never found the remedy necessary due to the defendant's obstruction. Rather, in 1996 the district court returned control over the remedy to the City and Yonkers was making good progress toward completing its remedial obligations. The Second Circuit's references to the activities of the 1980s is far off the mark.

findings would have demonstrated that the racial remedy is not designed to further a permissible goal of a federal court in ameliorating the effects of past discrimination. Rather, it redirected the remedy to a goal of racial balancing.

In 1986, as a remedy for the City's discriminatory conduct in confining subsidized and public housing to southwest Yonkers, the district court ordered Yonkers to facilitate public and subsidized housing in other parts of Yonkers. Pet. App. 105a-112a. Such a remedy was reasonably tailored to the identified violation of federal law. The district court's 1999 order converted the goal of the remedy from the creation of affordable housing in neighborhoods from which it had been excluded, to one designed to achieve a racial balance in neighborhoods through "moves" of minority families to other-race neighborhoods.

Such a program of racial balancing is not a permissible constitutional goal for a housing remedy. Housing is largely a matter of individual choice. Hence, the district court's order conflicts with this Court's decision in *United States v. Fordice*, 505 U.S. 717 (1992). *Fordice* made clear that in dismantling a prior dual system that invokes elements of choice rather than assignment, the constitution demands the elimination of the "policies and practices traceable to its prior system that continue to have segregative effects . . ." 505 U.S. at 731. That is exactly what the original remedy was designed to do: it eliminated the City's prior policy of confining low income housing to a single neighborhood and affirmatively required expansion of the subsidized housing program to all parts of Yonkers.

The district court's order converts this remedy to one where families are "assigned" to neighborhoods on the basis of their race. "Residential housing choices, . . . , present an ever-changing pattern, one difficult to address through judicial remedies." *Freeman v. Pitts*, 503 U.S. 467, 495 (1992). A remedy that assigns families to neighborhoods on the basis of their race is unnecessary to rectify the effects of the past practices of the City that formed the basis of the original violation. Review by

this Court is warranted to correct this adoption of an assignment policy based on race.

II. The Racial Remedy Approved By The Lower Courts Is Not Narrowly Tailored To A Compelling Interest.

This Court's decisions have consistently required that a racial remedy be narrowly tailored to precisely fit a compelling governmental purpose. The Second Circuit's analysis demonstrates how the *Paradise* factors are too vague to provide sufficient guideposts in constructing a racial remedy. The Second Circuit failed to sufficiently identify those aspects of the original remedy that needed strengthening and then tailor the remedy to that condition. Instead, the remedy imposed by the district court simply required the City of Yonkers to effectively exclude nonminority families from the City's affordable housing plan. The original finding of discrimination is not a license to adopt a racial remedy. Moreover, such a complete exclusion of people from receiving a governmentally-provided benefit is not narrowly tailored to the goal of remedying past racial discrimination against residents of public and subsidized housing.[12] It is a program of outright racial balancing intended to achieve a racial mix in local neighborhoods. Review by this Court is warranted to provide direction to lower courts on the proper application of the narrow tailoring aspect of strict scrutiny.

A. The District Court Lacked Any Justification For Adoption Of A Racial Remedy.

In 1985, the district court found that the City violated federal law when it confined public and subsidized housing to southwest Yonkers. 624 F. Supp. 1276. As a remedy, the district court determined that the City should facilitate the creation of public and subsidized housing outside the southwest quadrant of Yonkers. While it was expected that the court-ordered housing

12. Since 1988, the LTPO has included a race neutral preference for persons who have resided in Yonkers subsidized housing that remains in place under the current orders.

would further racial integration, the original remedy orders did not provide for race-based selection of housing occupants. *See* Pet. App. 254a-256a.[13] The remedy was properly tailored to the original violation; the City was required to create subsidized housing in those parts of Yonkers from which the City had previously excluded such housing. While the evidence at the 1986 remedy hearing showed that such housing would have an integrative effect, Pet. App. 46a-47a, it was clearly anticipated that the housing would not be tenanted on the basis of race.[14] Pet. App. 53a-55a.

When the City took control of remedy implementation following entry of the 1996 consent order, it began implementing the remedy in a race-neutral manner, consistent with the extant orders as well as the Constitution. The City also instituted an aggressive outreach program intended to reach residents of subsidized housing and other lower income applicants. As a result of such race-neutral efforts, the City assisted over 170 families in purchasing or renting affordable housing; some 70% of those families were African-American or Hispanic. Lodging App. 2, Section III. The results were entirely consistent with the evidence developed at the 1986 remedy hearing as well as the original remedy order. The City's program provided a remedy that sufficiently fit the original violation.

The NAACP was dissatisfied because some affordable housing in predominantly white neighborhoods was being occupied by white applicants who otherwise met all of the race-neutral occupancy requirements of the court orders and some minority applicants were selecting housing in those few

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13. The 200 unit public housing component of the remedy was completed by 1994. The units were, and remain, tenanted on a race-neutral basis.

14. It was expected that the court-ordered housing would have an integrative effect because, as shown in the liability phase, minority representation is greater in lower-income families than in higher-income families. Pet. App. 39a-40a.

predominantly minority neighborhoods located outside southwest Yonkers. As a result, the district court modified the occupancy requirements directing the City to ensure that families only move to neighborhoods predominated by the opposite race. Minorities could choose housing almost anywhere outside southwest Yonkers, in 1,419 census blocks with predominantly nonminority populations, while nonminority families could select housing located in only 28 census blocks with predominantly minority populations — effectively excluding them from the program.

The district court converted the remedy from one designed to provide a remedy for the exclusion of subsidized housing from a neighborhood to one designed to achieve some unspecified racial balance in neighborhoods. Such an end is not tailored to the goal of remedying past discrimination and is transparently designed for the sole purpose of racial balancing. Such a goal is not narrowly tailored to any legitimate purpose. *Croson*, 488 U.S. at 507 (1989). Unlike the case in *Paradise*, 480 U.S. 149, where the State of Alabama was dragging its feet in providing *any* promotional opportunities for its black employees, the City of Yonkers was actively providing housing opportunities to many minority families through race-neutral means. Minority families were receiving a disproportionately large share of the benefits in comparison to their representation among local residents. The district court's order requiring 100% minority participation in the program yielded to the plaintiffs' agenda of racial balancing and is not narrowly tailored to any legitimate goal. *Id.*

The district court expressed concern that an insufficient number of Priority 1 families were receiving the benefits of the remedy.[15] But, the preference for minority Priority 2 or 3 families

15. Priority 1 consists of those families that have lived in public or subsidized housing in Yonkers at any time since 1971. Pet. App. 140a. That occupancy criteria, while stated in race-neutral terms, describes a group that overwhelmingly consists of minority families. (Cont'd)

does absolutely nothing to further the goal of providing a remedy for Priority 1 households. Hence, the remedy imposed does not satisfy the district court's desire to more precisely target the remedy to Priority 1 families.[16] *Podberesky v. Kirwan*, 38 F.3d 147, 158 (4th Cir. 1994) ("district court did not sufficiently connect the problems the [defendant] purports to remedy to the [racial classification]").

B. The Second Circuit's Review Fell Far Short Of A Strict And Searching Examination.

The Second Circuit's review consisted of a recitation of the *Paradise* factors and conclusive findings that they had been met. Such a review was hardly the sort of searching examination necessary to justify racial relief. *See Middleton v. Flint*, 92 F.3d 396, 409-13 (6th Cir. 1996), *cert. denied*, 520 U.S. 1196 (1997) (reversing a district court's finding that plan was narrowly tailored by applying far greater scrutiny to the *Paradise* factors). The Second Circuit's cursory analysis demonstrates why further explanation of the *Paradise* factors by this Court is necessary to assist lower courts in assessing a racial remedy.

The Second Circuit never reviewed the original liability findings to assess the necessity for extreme racial relief. Rather, it summarily deferred to the district court's discretion and, without extended discussion, said race-neutral remedies were

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(Cont'd)

The district court characterized that group as the "hardcore victims of prior housing practices." Pet. App. 398a. Persons in Priority 2 or 3, regardless of their race, have no claim as victims of past discrimination.

16. The City has taken action to meet the district court's concern to assist Priority 1 families. It has conducted outreach to thousands of residents of public and subsidized housing seeking their participation in the program. It focused its attention on only assisting Priority 1 families during 2000. The City has raised subsidies per family and taken other steps designed to enhance participation in the remedy by the arguable victims of discrimination.

ineffectual. Pet. App. 18a. The Second Circuit's limited and deferential review demonstrates why strict and searching scrutiny is necessary. Rather than assessing the reasonability of the district court's decision that a racial classification was necessary, the lower court should have determined whether the remedy was the least intrusive possible, used only as a last resort and fitted the violation as precisely as possible. The lower court should have examined other non-racial or less intrusive racial remedies and explained why it rejected them. While the City contends its current efforts were sufficient to meet the goals of the 1986 Housing Remedy Order to provide integrative housing opportunities in those parts of Yonkers from which such housing had been excluded, other less onerous efforts to ensure nondiscriminatory housing practices should have been evaluated and possibly implemented. *See Raso v. Lago*, 135 F.3d 11, at 16, 17 (1st Cir. 1998), *cert. denied*, 525 U.S. 811 (1998) (rejecting claim that affirmative outreach policies to seek racial mix in subsidized housing creates a racial classification).

Nor was there any sufficient inquiry into the flexibility of the remedy. While the Second Circuit stated the obvious — that the "District Court will adjust the terms of the Order as needed" — that does nothing to ensure flexibility on the part of the City in its implementation of the remedy. The Order mandatorily excludes nonminority Priority 2 or 3 families from the program — a 100% quota — solely on the basis of their race. There is no "individualized procedure" or assessment of whether a family is a victim of past discrimination. The order simply furthers "administrative convenience" in achieving a racial balance. *See Croson*, 488 U.S. at 508; *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (plurality opinion).

The Second Circuit's treatment of the third factor, the relationship between the racial goal and the relevant market, ignores the requirement that the remedy be tailored to the scope of the discrimination. Often that issue may be assessed by statistical disparities in minority participation in the program at issue. *Hazelwood School District v. United States*, 433 U.S.

299, 307-08 (1977). There was no evidence here that minority families were being screened out of the program. On the contrary, minorities were receiving a disproportionately large 70% of the program's benefits — while the City used effective race-neutral procedures. Here, the lower courts approved the complete exclusion of nonminority families. "There is no more rigid quota than a 100% set-aside." *Metro Broadcasting v. FCC*, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting). A 100% quota bears no relationship to the representation of minority families seeking housing. *See Middleton v. City of Flint*, 92 F.3d 396, 412 (6th Cir. 1996), *cert. denied*, 520 U.S. 1196 (1997) ("It seems obvious that a plan's tailoring is less 'narrow' if it results in a very large degree of preference for minority group members (and corresponding disadvantage for non-minority group members) than if the degree of preference is smaller"); *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525, 1548 (11th Cir. 1994), *cert. denied*, 514 U.S. 1065 (1995) (rejecting "50% annual quota to establish a work force . . . reflecting black employment in lockstep proportion to the proportion of blacks in the local labor force").

Finally, the Second Circuit found the burden on nonminority families tolerable because those families could choose housing located in predominantly minority neighborhoods, and the order did not "expel[ ] any white families from housing they already inhabit." Pet. App. 20a. The fact is, the district court's order has had the practical effort of ending nonminority participation in the program for no legitimate reason.

III. This Case Presents Issues Of National Importance That Warrant Review By This Court.

The legality of race-conscious classifications imposed by a governmental actor is a matter to which this Court has necessarily devoted substantial attention over the past twenty years. Programs of racial balancing should never be imposed by a federal court. This Court has now firmly concluded that strict equal protection scrutiny applies to all governmentally

imposed classifications, *Adarand, supra*, and further addressed the sort of compelling governmental interests needed to justify a racial classification. *Wygant v. Jackson Bd. of Education*, 476 U.S. 267 (1986); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1990). But, further elaboration of the narrow tailoring prong of strict scrutiny analysis is necessary to ensure that sufficiently limited race-based remedies are imposed only as a true last resort in the most absolutely compelling of circumstances. The decision of the Second Circuit here, as well as the First Circuit in *Mackin v. City of Boston*, 969 F.2d 1273 (1st Cir. 1992), demonstrate how undue deference to a district court dilutes an appeals court's strict and searching examination of a racial classification. The Constitution should tolerate nothing less. Review by this Court would be helpful in ensuring that racial classifications imposed by a federal court are imposed only in the most exigent of circumstances.

CONCLUSION

Petitioner City of Yonkers requests that this Court grant its petition for writ of certiorari and vacate the judgments of the lower courts.

Respectfully submitted,

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